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In The

Supreme Court of the United States

October Term, 1991

JOHN W. EWING, et al.,

Petitioners,

v.

THE CITY OF CARMEL-BY-THE SEA, et al.,

Respondents.

Petition for Writ of Certiorari to the Sixth Appellate District Court of Appeal for the State of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

INTEREST OF AMICUS 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THIS COURT'S HOLDING IN NOLLAN DEMANDS HEIGHTENED JUDICIAL SCRUTINY OF LAND USE REGULATIONS CHALLENGED UNDER THE TAKINGS CLAUSE ... 6

II. NOLLAN'S HEIGHTENED SCRUTINY REQUIREMENT HAS BEEN WIDELY NOTED AND FOLLOWED BY COMMENTATORS AND COURTS 7

III. REJECTION OF THE HEIGHTENED SCRUTINY REQUIREMENT BY THE COURT BELOW HAS DEPRIVED PETITIONERS OF FEDERAL CONSTITUTIONAL SAFEGUARDS GUARANTEED TO ALL AMERICANS 10

CONCLUSION 11

TABLE OF AUTHORITIES CITED

Page

Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980).....3, 4

Blue Jeans Equities West v. City and County of San Francisco, 3 Cal. App. 4th 164 (1992)..... 9

Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991)..... 9

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).....5, 11

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987)..... 2

Hodel v. Irving, 481 U.S. 704 (1987)..... 2

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987)..... 2

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)..... 4

Nollan v. California Coastal Commission, 483 U.S. 825 (1987)..... *passim*

Seawall Associates v. City of New York, 542 N.E.2d 1059 (1989)..... 9

Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal. App. 3d 1260 (1991)..... 9

Yee v. City of Escondido, ___ U.S. ___, No. 90-1947, slip op. (Apr. 1992).....6, 7

Rules and Regulations

Supreme Court Rule 37..... 1

TABLE OF AUTHORITIES CITED—Continued

Page

UNITED STATES CONSTITUTION

Amendment V 2, 4

Amendment XIV 2, 4

MISCELLANEOUS

Lawrence Berger, Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases, 70 Neb. L. Rev. 186 (1991) 8

Brian W. Blaesser & Christine M. Kentopp, Impact Fees: The "Second Generation," 38 Wash. U. J. Urb. & Contempt. L. 55 (1990) 7-8

James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights (1992) 7

Note, "Taking" on the Environment: The Takings Clause and Environmental Law—Some Observations, 36 Loy. L. Rev. 1083 (1991) 8

R. S. Radford, Statistical Error and Legal Error, 21 Loy. L.A. L. Rev. 843 (1988) 11-12

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for writ of certiorari. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

INTEREST OF AMICUS

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in the landmark United States Supreme Court case, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), *Hodel v. Irving*, 481 U.S. 704 (1987), and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The present case involves an egregious violation of federal constitutional rights in the guise of local land use

regulation. The opinion below upholds a regulation that extinguishes a valuable property interest, even though it fails to advance its asserted police-power objectives. The regulation thus fails *both* parts of this Court's threshold standards for regulatory takings:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.

Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

The court below acquiesced in the city's violation of petitioners' fundamental rights by fabricating a rationale for the ordinance based entirely on the court's own fanciful sociological theories. If allowed to stand, the opinion below will constitute a serious setback for individual rights by undermining this Court's careful efforts, over the past two decades, to restore full constitutional protection to private property rights.

STATEMENT OF THE CASE

The City of Carmel-by-the-Sea (City) has a long history of municipal ordinances designed to exclude, harass, or discriminate against nonresidents. Petitioners are residential homeowners in the City who have engaged in the common, lawful activity of renting out their homes to vacationers. In 1989 the City adopted Ordinance No. 89-17, which prohibits petitioners from renting their homes for terms of less than 30 days. Petitioners brought this action challenging the ordinance as a taking of their

property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Although the City's asserted police-power rationale for the ordinance has been shown to be spurious, and the measure extinguishes a valuable interest in private property, the California Court of Appeal declined to apply the close scrutiny demanded by this Court in regulatory takings cases. Instead, the court below applied the discredited "rational basis" standard of review rejected by this Court in *Nollan* and upheld the measure on the basis of the court's own fanciful sociological speculations.

SUMMARY OF ARGUMENT

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This Court has long held that the Takings Clause can be violated by either of two broad categories of state action. Uncompensated physical invasions of property are *per se* violations of the Takings Clause under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Takings Clause is also violated under this Court's regulatory takings doctrine whenever the character of the government's regulatory action is such that it fails to substantially advance legitimate government interests. The same is true when the economic impact is such that it deprives an owner of economically viable use of property. *Agins v. City of Tiburon*, 447 U.S. at 260.

In *Nollan v. California Coastal Commission*, this Court established a requirement of heightened judicial scrutiny for courts examining property regulations challenged as regulatory takings. 483 U.S. at 835 n.3. The deferential standard of review appropriate to due-process inquiries was specifically rejected as inadequate for takings cases. *Id.*

The case at bar involves an unwarranted prohibition of a common and lawful use of private property in order to exclude outsiders from a community. The municipality asserted a boilerplate police-power rationale for this measure, but the court below acknowledged there is no evidence that the prohibited activity has any relationship to the asserted governmental objectives.

Instead of applying the heightened scrutiny required by this Court in *Nollan*, however, the court below retreated to the highly deferential due-process standard of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Thereupon, the appellate court fabricated a wholly novel rationale for the regulation based entirely on the court's own pseudo-sociological speculations. The court then used these unsupported, ad hoc fantasies to uphold the challenged measure against petitioners' takings challenge.

The level of scrutiny applied by the court below is no more than an exercise in judicial imagination to find some way to uphold a patently unconstitutional enactment. This may once have been an appropriate standard of review in due-process cases under *Euclid*. However, this intensely deferential attitude was explicitly rejected by this Court in *Nollan*.

Review should be granted to resolve the conflict that has been created among lower court jurisdictions concerning *Nollan's* requirement of heightened scrutiny in regulatory takings challenges and to prevent future conflicts on this important issue.

ARGUMENT

I

THIS COURT'S HOLDING IN NOLLAN DEMANDS HEIGHTENED JUDICIAL SCRUTINY OF LAND USE REGULATIONS CHALLENGED UNDER THE TAKINGS CLAUSE

In its leading case in the field of regulatory takings, this Court clearly established that land use regulations challenged under the Takings Clause must be subjected to a heightened standard of judicial review. Such enactments may no longer be upheld merely by reference to a "rational relationship" to their asserted objectives:

> [O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the contrary, . . . [w]e have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State *'could rationally have decided'* the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 835 n.3 (citations omitted; emphasis in original).

The heightened scrutiny requirement was recently emphasized by this Court in *Yee v. City of Escondido*,

___ U.S. ___, No. 90-1947, slip op. (Apr. 1992). The regulation at issue in *Yee* was upheld against a claim that it authorized a permanent physical invasion. However, this Court noted that a regulatory takings challenge would have warranted closer scrutiny to determine "whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Yee*, slip op. at 9 (citing to *Nollan*).

II

NOLLAN'S HEIGHTENED SCRUTINY REQUIREMENT HAS BEEN WIDELY NOTED AND FOLLOWED BY COMMENTATORS AND COURTS

Nollan's heightened scrutiny requirement has not languished in obscurity. It has been widely noted and discussed in legal journals and commentaries, often by authors who are openly hostile to the *Nollan* doctrine. A random sample of this literature would include passages such as:

> The *Nollan* decision alarmed land use regulators because it signalled a heightened degree of judicial supervision.

JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 148 (1992).

> The *Nollan* case . . . suggests that a heightened standard of review has replaced the less stringent standard applied by California and Texas courts in cases in which the challenger has alleged a regulatory taking of private property for public purposes without just compensation.

Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The "Second Generation,"* 38 WASH. U. J. URB. & CONTEMP. L. 55, 100 (1990).

> Nollan marks a move away from the minimal-rationality test that had been used by the Court in its prior takings analysis.

Note, *"Taking" on the Environment: The Takings Clause and Environmental Law—Some Observations,* 36 LOY. L. REV. 1083, 1098 (1991).

> *Nollan* established that a meaningful, heightened, nexus scrutiny of governmental regulation of property rights is, henceforth the governing norm.

Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases,* 70 NEB. L. REV. 186, 211 (1991).

Citations to a representative selection of additional published references to *Nollan's* heightened scrutiny requirement have been appended to this brief as Appendix A. Given this extensive body of literature, it is hard to imagine that the court below could have been unaware that this Court has mandated a heightened standard of review for claims such as petitioners'.

In addition to receiving widespread coverage in the legal literature, *Nollan's* requirement of heightened scrutiny in regulatory takings cases has been recognized and applied by state courts faced with federal takings claims brought under the Fourteenth Amendment.

> [Regulatory takings challenges require] "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" as articulated in *Nollan*.

Seawall Associates v. City of New York, 542 N.E.2d 1059, 1068 (1989).

> Nollan . . . changed the standard of constitutional review in takings cases. Whether the new standard is described as "substantial relationship," or "heightened scrutiny," it is clear the rational basis test . . . no longer controls.

Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal. App. 3d 1260, 1270 (1991).

Recently, however, some lower courts have fallen into error on this point. For example, a brief filed with the California Supreme Court opposing review of the decision below cites *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), for the erroneous proposition that *Nollan* does not require heightened scrutiny. And in an even more bizarre ruling, a California court has proclaimed that *Nollan* does not apply to regulatory takings cases at all. *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164 (1992). Although obviously flawed and implicitly overruled by *Yee*, these aberrant decisions have created a conflict among state and federal jurisdictions on this vital issue. They underscore the need for this Court to grant the writ of certiorari sought by petitioners in order to resolve conflicts among the jurisdictions over the heightened scrutiny requirement set forth in *Nollan*.

III

REJECTION OF THE HEIGHTENED SCRUTINY REQUIREMENT BY THE COURT BELOW HAS DEPRIVED PETITIONERS OF FEDERAL CONSTITUTIONAL SAFEGUARDS GUARANTEED TO ALL AMERICANS

The court below expressly recognized that petitioners raised a regulatory takings challenge under the United States Constitution. *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App. 3d 1579, 1583 (1991). Disregarding the plain teaching of this Court, however, the California panel declined to apply any meaningful scrutiny to the ordinance at issue.

The City cloaked Ordinance No. 89-17 in a boilerplate police-power rationale, claiming that the occasional rental of private homes causes increased traffic, parking problems, light, glare, and noise. *Ewing*, 234 Cal. App. 3d at 1589. The appellate court properly looked behind this asserted rationale and found that it had no basis in fact. *Id.* at 1589-90.

At this point, the heightened scrutiny demanded by *Nollan* permits only one outcome. Since the prohibited property use has been shown not to cause the problems purportedly addressed by the ordinance, the ordinance cannot possibly "substantially advance" the mitigation of these problems. Because it fails to substantially advance the City's asserted purposes, the ordinance must be struck down as unconstitutional under *Nollan*.

Instead, the court below embarked on a breathtaking exercise of uninformed sociological theorizing in a quest to salvage the ordinance. On its own authority and with

no evidence before it, the appellate court proclaimed that vacation renters do not become little league coaches, scout troop leaders, or hospital volunteers—and therefore that banning such individuals from the community comprises a legitimate state interest in itself! *Ewing*, 234 Cal. App. 3d at 1591.

On its face, this burlesque of legal reasoning entails a rejection of any meaningful concept of heightened scrutiny. Indeed, the court below acknowledges that it seeks only to find some "rational relationship" between the City's ordinance and some governmental objective. *Id.* at 1596. The California court's application of an inadequate standard of review is highlighted by its reliance on a 70-year-old due-process case, *Euclid v. Ambler Realty Co.* *Euclid's* intensely deferential standard of review may still be appropriate to due-process inquiries, but it is manifestly inadequate for regulatory takings challenges. *See Nollan*, 483 U.S. at 835 n.3.

CONCLUSION

The rejection of *Nollan's* heightened scrutiny requirement by the court below, and its resurrection of the deferential due-process standard of *Euclid*, is more than a simple mistake in the application of federal constitutional law. Rather, it amounts to a denial of fundamental rights guaranteed by the United States Constitution. The appropriate standard of judicial review is not a mere procedural detail. In close cases, the level of scrutiny determines the outcome of litigation. *See* R. S. Radford,

Statistical Error and Legal Error, 21 LOY. L.A. L. REV. 843, 870-79 (1988). In the context of regulatory takings, the level of scrutiny determines whether individual property rights will be protected against predatory and confiscatory regulations or not.

While California courts may be justified in departing from federal precedent in order to extend *greater* constitutional protections to California citizens than the federal courts provide, such is manifestly not the case here. To the contrary, the California Court of Appeal has *deprived* petitioners of important rights recognized and protected by the decisions of this Court.

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari should be granted.

DATED: April, 1992.

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APPENDIX A

PUBLISHED CITATIONS TO THE HEIGHTENED SCRUTINY REQUIREMENT OF *NOLLAN v. CALIFORNIA COASTAL COMMISSION*

Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 NEB. L. REV. 186, 210-12 (1991).

Robert K. Best, *The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules for Exactions*, 10 ZONING & PLAN. L. REP. 153 (Sep.-Oct. 1987).

Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The "Second Generation,"* 38 WASH. U. J. URB. & CONTEMP. L. 55, 100 (1990).

Bruce W. Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy,"* 44 ARK. L. REV. 65, 99 (1991).

Comment, *"Get It Right the First Time": A Message from the Supreme Court to Land Use and Environmental Regulators—A Comment on Nollan and First English*, 7 UCLA J. ENVT'L L. & POL'Y 173, 177-78 (1988).

Comment, *Justice Stevens' Pro-Land Use Planning Views and Recent Regulatory Takings Cases*, 21 URB. LAW. 579, 584 (1989).

Michael H. Crew, *Development Agreements After Nollan v. California Coastal Commission, 483 U.S. 825 (1987)*, 22 URB. LAW. 23, 34-37 (1990).

Gary Eisenberg, *Property: The Takings Clause of the Fifth Amendment*, 1988 ANN. SURV. AM. L. 1101, 1122.

James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 148 (1992).

William A. Falik & Anna C. Shimko, *The "Takings" Nexus: The Supreme Court Chooses a New Direction in Land-Use*

Planning: A View from California, 39 HASTINGS L. J. 359, 390 (1988).

Daniel R. Mandelker, LAND USE LAW §2.23 at 45 (2d ed. 1988).

Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. COLO. L. REV. 599, 613 (1991).

Note, *A Constitutional Standard of Review for Permit Conditions, Exactions, and Linkage Programs: Nollan v. California Coastal Commission*, 30 B.C. L. REV. 903, 926-29 (1989).

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Note, *The Supreme Court, 1986 Term: Leading Cases*, 101 HARV. L. REV. 119, 245, 247 (1987).

Note, *"Taking" on the Environment: The Takings Clause and Environmental Law--Some Observations*, 36 LOY. L. REV. 1083, 1098 (1991).

Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L. J. 335 (1988).

Bart H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1450 n.1 (1990).